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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 523

UNITED INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, CHARLES JOSEPH, SAM JOSEPH and LOUIS HIRSCHORN,

Petitioners,

vs.

JOHN R. MALONEY, individually and as Insurance Commissioner of the State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California, First Appellate District, Division One.

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to the District Court of Appeal of the State of California, First Appellate District, Division One.

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal

of the State of California, First Appellate District, Division One, entered in this case on August 18, 1954 (hearing in the California Supreme Court denied on October 13, 1954), reversing the order of the Superior Court of the State of California in and for the City and County of San Francisco, granting a preliminary injunction.

OPINIONS BELOW.

The opinion of the District Court of Appeal is reported in 127 Advance California Appellate Reports at p. 211, and in 273 Pacific Reporter (2d) at p. 579. The order of the California Supreme Court denying a hearing appears in the minutes of that court reported in 43 Advance California Reports, No. 18, minutes, page 1.

JURISDICTIONAL STATEMENT.

(i) The judgment sought to be reviewed was entered by the District Court of Appeal of California on August 18, 1954, and became final under California law on October 13, 1954, on which date the Supreme Court of California denied a petition, filed by petitioners, for hearing by that court.

(ii) A rehearing by the District Court of Appeal was denied by that court on September 24, 1954. No rehearing by the California Supreme Court was sought.

(iii) Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by Subsection 3 of Section 1257 of Title 28 of the United States Code.

Petitioners invoke the jurisdiction of this Court on the ground that the judgment below denied the right of petitioners to the equal protection of the law and the right not to be deprived of liberty and property without due process of law, all as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW.

1. Where the California Insurance Commissioner intentionally and deliberately discriminated against petitioners in commencing and prosecuting a disciplinary administrative proceeding aimed at suspending or revoking petitioners' licenses to engage in the insurance business in California, and the further prosecution of such intentionally and deliberately discriminatory proceeding is in fact causing and threatens to cause great and irreparable injury to petitioners unless said proceeding is at once enjoined, does a judgment by a California appellate court that the courts of California lack power to enjoin such deliberately discriminatory proceeding until petitioners have "exhausted their administrative remedies" by submitting to and undergoing the very administrative proceeding complained of, deny petitioners equal protection of the laws?

2. Does a judgment by the California appellate court that petitioners, who alleged and presented proof in the trial court that an administrative proceeding commenced against them by the California Insurance Commissioner was instituted by him with intentional and deliberate discrimination, must submit that issue for determination in the administrative proceeding by that very same Insurance Commissioner (who has, before the hearing commenced, stated under oath that he knows the charge of discrimination is unfounded), before judicial relief may be sought, deny petitioners due process of law?

CONSTITUTIONAL PROVISION INVOLVED.

The pertinent constitutional provision involved is contained in Section 1 of the Fourteenth Amendment to the United States Constitution, as follows:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

The action below was an injunction suit, commenced on February 24, 1953, to enjoin the California Insurance Commissioner from further prosecuting an administrative proceeding brought by him against petitioners, plaintiffs below, aimed at suspending or revoking their license to engage in the insurance busi-

ness in California. The complaint alleged that in initiating and prosecuting the administrative proceeding, respondent Commissioner was illegally and unconstitutionally intentionally discriminating against petitioners and denying them the equal protection of the laws, and that said intentional and illegal discrimination was causing and, unless restrained, would cause plaintiffs great and irreparable harm and deprive them of liberty and property without due process of law. (Clerk's Tr. pp. 13-14, Complaint, par. XVII.)

At the hearing in the trial court upon the preliminary injunction, petitioners introduced evidence establishing the following: The administrative proceedings commenced by the Insurance Commissioner against petitioners charged misleading advertising and fraudulent conduct in the sale of commercial health and accident insurance, specifications being set forth in the accusation. In each and every case, the basis of the charge was that petitioners had used descriptive literature generally describing the benefits of particular policies, without specifically referring to certain exclusions, restrictions and conditions which might limit coverage in particular cases.[1] (Accusation, Ex. A, pars. V-XVII.) Petitioner United had

[1]We must emphatically point out: (1) exclusions, exceptions and limitations are absolutely necessary in health insurance, if it is to be sold without physical examination and if premium costs are to be equitably distributed among policyholders, and (2) it is absurd to suppose that a simple advertisement, designed only to create interest and provoke further inquiry, must in effect reprint all of the terms and conditions of the policy or be subject to the charge of fraudulent deception. The existence of such defense on the merits is not, however, here relied on.

commenced doing commercial health and accident insurance business in California in September, 1950; the individual petitioners became United's general agents in California on that date, having previously been general agents for the World Insurance Company. (Aff. of Sam Joseph, Ex. 11, pp. 2-3.) For many, many years, a great number of insurance companies, running to several hundred or more, had sold commercial health and accident insurance in California. Copies of all of the policy forms of such companies were filed, and kept on file, with the California Department of Insurance, of which respondent Insurance Commissioner is the head. All of the policy forms issued by such companies had contained, and do contain, exclusions, restrictions and conditions as to coverage essentially similar to those in United's policy forms. In February 1953, and for many years prior thereto, all of these other insurance companies had employed descriptive literature and advertising which likewise generally described the benefits of particular policies but omitted to specifically refer to the existence or terms of the exclusions and restrictions contained therein. Documentary evidence consisting of literature of a number of other companies, which in turn were but typical of those of all the companies, was presented in the trial court, with an analysis showing such literature had all the "defects" complained of in petitioners' literature; respondent Commissioner never challenged the correctness of that analysis. (Aff. of Sam Joseph, Ex. 12, pp. 1-35.) For years, the Department of Insurance and respondent Insurance Commissioner had been well aware of

this practice by all the companies; this was expressly conceded by respondent (Aff. of Maloney, Ex. B, pp. 1-2; letter of Fullenwider, Ex. B to Aff. of Pauley, Ex. 9).

Despite the fact that the practices complained of by respondent Insurance Commissioner as to petitioners were general throughout the industry, such fact having been well known for a long time by respondent, neither the Insurance Department nor respondent Commissioner, its head, had ever commenced any disciplinary or other proceedings of any kind against any other health and accident insurance companies doing business in California,[2] or their agents, based on such practices, until the accusations against petitioner were filed in September 1952. (Aff. of Sam Joseph, Ex. 11, p. 17.) Nor were any accusations based on such charges filed against anyone else right down to April 21, 1953, the date the trial court issued the preliminary injunction.[3] The evidence further showed that, far from special circumstances existing to justify such discrimination against petitioners, the material complained of by respondent

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[2]Save for an accusation filed against The World Insurance Company, the previous employer of the individual petitioners, several weeks earlier in August 1952.

[3]In the trial court, respondent contended an accusation filed by him against California Life Insurance Company was similar; this was vigorously denied by petitioners. (Aff. of Chas. Joseph, Ex. 16, p. 2.) Respondent made no attempt to prove the contention, and the conflict must be deemed resolved against him by the trial court's ruling. In the District Court of Appeal, respondent sought to present material concerning certain accusations filed by him after the preliminary injunction was granted. Petitioners moved to strike such material as not properly before the court, and the District Court of Appeal refused to consider it.

Insurance Commissioner had been specifically approved by top officials of his Department in 1947 when used by the individual petitioners as general agents for the World Insurance Company, that such material had been used with the full knowledge of the Department in large quantities for several years on behalf of the World, and that United had adopted the advertisement in question for the very reason that it had been so approved by the Department.[4] (Aff. of Sam Joseph, Ex. 11, pp. 3-5; Aff. of Sam Joseph, Ex. 18, pp. 7-11.) No complaint of any kind had been made to petitioners by respondent Insurance Commissioner concerning such literature, save for one letter which called attention to one minor point which was at once corrected. (Aff. of Sam Joseph, Ex. 11, pp. 7-8.)

Petitioners further presented proof before the trial court that very great and extensive damage had been done their business by the prosecution initiated by respondent Commissioner. This damage consisted in numerous cancellations of policies, resignation of many of petitioners' sales agents and inability to recruit new agents, and greatly increased selling costs in an endeavor to counteract the adverse publicity which petitioners received on a national scale from respondent Commissioner's charges. (Aff. of Sam Joseph, Ex. 11, pp. 9-19 and sub-exhibits thereto #3-18; Aff. of Louis Hirschorn, Ex. 4, pp. 2-3; Aff. of

[4]No charge was made against the World in the accusation referred to in footnote 2, as to the use of such material, although it was essentially identical with that of United, on which the accusation against United was based.

Chas. Joseph, Ex. 5, pp. 1-2; Aff. of Shomberg, Ex. 10, pp. 1-2.)

On the basis of the foregoing evidence of intentional discrimination and of great and serious damage, the trial court granted a preliminary injunction restraining respondent Commissioner from further proceeding with the discriminatory administrative prosecution. Since the granting of the preliminary injunction by the trial court, respondent Commissioner has not contested, and in fact has expressly disclaimed an intent to contest, these issues of fact.

These concessions appear in his briefs before the District Court of Appeal.

On the question of discrimination, his Opening Brief stated:

> "The issue is not whether an administrative officer in commencing the proceeding, was acting unlawfully or violating the 'equal protection' clause—i.e., committing unconstitutional discrimination . . ., so we must again emphasize that the issue on this appeal does *not* have to do with whether there has been unconstitutional discrimination against appellants [sic] in bringing the administrative proceedings . . ."
>
> (Appellant's Opening brief, pp. 9-10. Emphasis added.)

On the question of the existence of great damage in fact, his Answer to the Petition for Rehearing in the District Court of Appeal stated:

> "Defendant did *not at any time,* either in the lower court or on appeal, *attempt to* argue or

> otherwise *contest* the *allegations as to damage* done, since it [sic] regarded them as irrelevant." (Answer to Petition for Rehearing, p. 2, lines 9-13, emphasis added.)

Instead, respondent Commissioner confined his attack on the trial court's order to the point that the trial court lacked power to grant any relief on the facts alleged unless petitioners had previously "exhausted their administrative remedies" by submitting to and undergoing the very discriminatory administrative prosecution complained of; in short, that no relief of any kind was available to prevent the damage caused and threatened by the discriminatory administrative proceeding.

This contention of respondent was accepted by the California District Court of Appeal in its opinion, which likewise did not challenge or dispute the implied findings of the trial court as to the presence of intentional discrimination and the presence and threat of continued irreparable damage.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED IN THE STATE COURT.

The Federal questions set forth above were raised in the court of first instance, the Superior Court of the State of California, in and for the City and County of San Francisco, and were set forth in and raised by the original complaint filed by petitioners. The portions of the complaint above referred to read as follows:

"XVII

"The filing of said accusations against plaintiffs and the commencement and prosecution of said disciplinary proceedings in connection therewith against plaintiffs, in conjunction with the failure of defendant to file any such accusation or commence and prosecute any such disciplinary proceeding against any of the remaining insurance companies transacting accident and sickness insurance business in the State of California (except World Insurance Company), and the intention, plan and design of defendant not to file any such accusation or commence or prosecute any such proceeding in the future against any of said companies, despite the fact that the descriptive literature used now and in the past by said other insurance companies was [and] is similar in character and nature to the descriptive literature of plaintiffs referred to in said accusations against them, and contains the same or similar alleged misrepresentations and violations, and the fact that defendant well knows and appreciates and has long known and appreciated that the literature of said other companies contained and contains the same alleged objectionable features, constitutes an illegal and unconstitutional discrimination by defendant against plaintiffs, and each of them, and deprives said plaintiffs and each of them of liberty and property without due process of law and deprives said plaintiffs and each of them of the equal protection of the laws, and deprives said plaintiffs and each of them of their constitutional rights under the constitutions of the State of California and the United States of America, and in particular of their rights under Article I, Sections 1, 11 and 21 of the constitution of the State

of California and Section I of the Fourteenth Amendment of the Constitution of the United States of America."

(Complaint, par. XVII, C.T. pp. 13-14.)

The Superior Court, after receiving affidavits and hearing argument, granted a preliminary injunction enjoining the conduct by defendant Insurance Commissioner of which complaint was made. (C.T. pp. 26-28.) The judgment of the District Court of Appeal (contained in the opinion of that court, and printed in the Appendix) reversed the order of the trial court, without discussing the evidence before that court, on the grounds that the trial court lacked power to grant relief unless plaintiffs had first "exhausted their administrative remedies" by submitting to the proceeding complained of, and that the law gave no relief for the damage of which petitioners complained. The California Supreme Court denied a hearing without opinion.[5]

ARGUMENT WHY CERTIORARI SHOULD BE GRANTED.

Petitioners believe the court below has decided two federal questions of substance not heretofore determined by this Court, namely:

(1) Must a party who is suffering great damage from the conduct of an intentionally discriminatory administrative proceeding brought against him, in

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[5]On October 18, 1954, the District Court of Appeal ordered that its judgment, and issuance of the remittitur upon said judgment, be stayed pending filing and determination of this petition for certiorari. See said order as set forth in the Record.

violation of his right to Equal Protection of the laws, submit to and undergo the entire unconstitutional proceeding, and suffer the damage resulting therefrom, before being entitled to seek judicial relief of any kind?

(2) Does due process permit a state to require that the issue whether an administrative official has commenced and is pressing an administrative prosecution with intentional discrimination, in violation of the constitutional rights of the party proceeded against, be heard and determined by the very individual so accused of intentional discrimination, particularly where that individual, prior to any hearing, has stated under oath that to his personal knowledge there is no merit to the charge of discrimination?

THE COURT BELOW, THOUGH CONCEDING THAT INTENTIONAL DISCRIMINATION IN THE ENFORCEMENT OF AN OTHERWISE VALID LAW IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION, NEVERTHELESS DENIED PETITIONERS ANY RELIEF AGAINST SUCH DISCRIMINATION.

The unconstitutionality of intentional and deliberate discrimination in the enforcement of an otherwise valid law is a proposition as old as the case of *Yick Wo v. Hopkins,* 1885, 118 U. S. 356, 30 L. Ed. 220, 227, and has been repeatedly reaffirmed by this Court. See *Sunday Lake Iron Co. v. Township of Wakefield,* 1918, 247 U. S. 350, 352, 62 L. Ed. 1154, 1155; *Snowden v. Hughes,* 1944, 321 U. S. 1, at 8, 88 L. Ed. 497, at 503. See also *Glicker v. Michigan Liquor Control Commission,* 1947, 160 Fed. (2d) 96.

The latest reference to this doctrine by this Court appears in *National Union of Marine Cooks and Stewards v. Arnold,* November 22, 1954, ... U. S. ....., 99 L. Ed. (Adv. p. 70, at 73) where the Court said:

> "We have no difficulty with the Equal Protection Clause *because no showing has been made that anyone comparably situated has been treated differently from petitioner.*" (Emphasis added.)

The case which petitioners in the instant case made in the trial court, and which the trial court in granting the preliminary injunction accepted, involved just such a showing, namely, that all health and accident insurance companies in California engaged in the identical practice, that respondent Commissioner well knew this, but proceeded against only petitioners (and one other company).

The District Court of Appeal expressly conceded that intentionally discriminatory enforcement of an otherwise valid law was unconstitutional, and did not question the sufficiency of the evidence in the trial court as to such discrimination and the damage caused thereby. Yet, while stating this, that court denied petitioners any remedy or relief against violation of their constitutional right to equal protection by holding that no relief of any kind was available until *after* petitioners had submitted to the very prosecution causing them the unconstitutional damage, that is, the proceeding before the very official intentionally discriminating against them, and after the threatened damage had been done. That court further held that

damage resulting from the holding of such an unconstitutional administrative hearing was not "damage" for which the law gives relief.

Such a ruling in effect holds that petitioners have a constitutional right but no means to vindicate it; as a practical matter, it undermines the entire *Yick Wo* doctrine, and makes the Equal Protection clause a "promise to the ear", broken to the hope.

The Court below relied on such cases as *Myers v. Bethlehem Building Corp.*, 1941, 303 U. S. 41, 82 L. Ed. 638, *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, and similar cases and failed to note that those cases involved challenges to the jurisdiction of administrative bodies on the ground that under the true facts the challenging parties were not subject to the jurisdiction of the administrative body; this Court rejected such challenges, holding that Congress had granted the power to determine such jurisdictional facts in the first instance to the administrative agency. None of these cases involved intentionally discriminatory administrative proceedings, or proceedings unconstitutional in any other respect; none of them, therefore, is comparable to the present action.

The trial courts of California have jurisdiction to enjoin discriminatory prosecution of criminal charges. See *Wade v. City and County of San Francisco*, 1947, 82 Cal. App. (2d) 337; and *Bueneman v. City of Santa Barbara*, 1937, 8 Cal. (2d) 405 and *Jones v. City of Los Angeles*, 211 Cal. 304, relied upon in the *Wade* case. To grant equitable relief to parties faced with one kind of discriminatory prosecution, and deny it

to others faced with a similar kind of discriminatory prosecution, is itself a denial of equal protection of the laws. *Truax v. Corrigan,* 1922, 257 U. S. 312, 66 L. Ed. 254.

Petitioners submit the holding of the court below, denying relief for damage done by unconstitutional conduct, violates the letter and spirit of the Equal Protection clause.

TO COMPEL PETITIONERS TO SUBMIT THE ISSUE OF RESPONDENT INSURANCE COMMISSIONER'S INTENTIONAL DISCRIMINATION AGAINST THEM TO BE HEARD AND DETERMINED BY RESPONDENT INSURANCE COMMISSIONER—THE VERY PARTY CHARGED WITH DISCRIMINATION—IS FUNDAMENTALLY UNFAIR, AND DENIES PETITIONERS DUE PROCESS OF LAW.

The complaint in this action, after alleging that respondent Insurance Commissioner was about to proceed to conduct a disciplinary hearing which was intentionally discriminatory, alleged that such conduct by respondent Insurance Commissioner "deprives said plaintiffs and each of them [that is, petitioners] of liberty and property without due process of law." (C. T., p. 13, lines 22-25, Complaint, para. XVII.) The gross unfairness of such procedure became even more manifest when respondent Insurance Commissioner submitted an affidavit to the trial court stating that to his personal knowledge the charges of discrimination brought by petitioners against him were without merit. (Defendant's Ex. B, Aff. of John R. Maloney, p. 4.) Yet this is the very issue which the

District Court of Appeal held petitioners must submit to him, sitting as a "judge"!

We do not contend that respondent, or any administrative official, because he brings charges and acts as prosecutor, is thereby disqualified from hearing and passing upon the charges brought *by* him; we do urge, however, that respondent is not a proper "judge" to pass upon and cannot fairly hear and determine petitioners' charges *against* respondent, of intentional, illegal and unconstitutional action—in short, official misconduct. We further contend that any judgment requiring petitioners to submit such charges to a "judge" so intimately and personally involved denies a fair trial, and thus denies due process of law. In all comparable situations, spelled out in many cases, our Anglo American tradition forbids any such procedure. The situation is in principle comparable to that in *Offutt v. United States,* November 8, 1954 ..... U. S. ....., 99 L. Ed. p. 7, where this Court set aside a judgment punishing an attorney for contempt because of an "infusion of personal animosity" between counsel and judge. The instant case is, if anything, stronger, since the issue is not what a judge believed to be misconduct on the part of an attorney, but rather a charge of official misconduct directed at the "judge" himself.

The futility of such procedure has been recognized in two recent Federal cases which provide an almost exact parallel to the case below, namely, *Davis v. Cook,* U. S. District Court, N. D., Ga. 1948, 80 Fed. Supp. 443, and *Carter v. School Board of Arlington,* Va., 1950, 182 Fed. (2d) 531, at 536.

In the *Davis* case[6] the trial court enjoined the Atlanta, Ga., Board of Education from continuing an intentionally discriminatory practice in making unequal pay schedules for Negro and white teachers in the Atlanta schools. In answer to the contention that plaintiffs had not exhausted their administrative remedies, the court stated:

> "No administrative remedy for removing inequalities was provided at the time the suit was filed and the provision for appeal to the superintendent, with right to review by the Board, was for an appeal *not to a disinterested arbitrator, but to the very agents who made the placements* and fixed the salaries *in the first instance.* So that, even if the remedy had existed at the time of filing the suit, *it would not have been such as must be exhausted before appealing to the courts for a judicial determination of a constitutional right.*"
>
> (P. 452, emphasis added.)

Not only is it absurd to expect that respondent Insurance Commissioner, sitting as a "judge", would find himself guilty of intentionally unconstitutional conduct; in the instant case we have his affidavit, prior to any hearing, that to *his personal knowledge* there is no merit to the charge of discrimination! In view of such obvious prejudgment (of his own case!) only one result as to this issue in any proceeding before him

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[6]The specific result in this case was reversed by the Court of Appeals in 178 Fed. (2d) 595 on grounds that do not affect the validity of the principle above stated. The Court of Appeals held the plaintiffs did have an administrative remedy to a higher official who was in fact disinterested. No such administrative appeal from respondent Insurance Commissioner is available in this case.

is conceivable. Under such circumstances no true trial would be had.

In *Wong Yang Sung v. McGrath,* 1950, 339 U. S. at 50, 94 L. Ed. 616, 628, this Court said:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."

The hearing to which the court below would remit petitioners does not meet such standards; much less gross prejudgment than here present has brought reversal in many decided cases.

In *U. S. ex rel. Accardi v. Shaughnessy,* 1954, 347 U. S. 260, 98 L. Ed. 680, this Court held a collateral attack by way of habeas corpus on a deportation order was proper, where it was alleged that the administrative department concerned, in advance of the hearing provided for, had prejudged the case and determined that petitioner must be deported. In *Accardi,* the denial of a fair hearing lay in the fact that the Board of Immigration Appeals was allegedly improperly influenced by the previous announcement of the Attorney General, the Board's superior, that Accardi must be deported; in the instant case, the prejudgment is not merely that of a superior of the administrative "judge"—it is a prejudgment by the "judge" himself.

In *Whittaker v. McLean,* 1941, Court of Appeals, D. C., 118 Fed. (2d) 596, the court reversed a jury verdict where the trial judge, in the absence of the jury, had expressed hostility to the plaintiff, stating

"but a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." There, a jury who had not heard the judge's remarks was the ultimate arbiter; in our case, it is the biased "judge" himself.

In *Connelly v. U. S. District Court,* 1951, 191 Fed. (2d) 692, at 697, the Court of Appeals for the Ninth Circuit granted a writ of prohibition ordering a particular Federal District Judge to step aside in a case where he had, before trial in colloquy with counsel, "deprecated" the counsel's client, and ignored the presumption of innocence. The court quoted this Court's language in *Berger v. U. S.,* 255 U. S. 22, 35:

> ". . . that the tribunals of the court shall *not only* be impartial in the controversies submitted to them but shall give *assurance* that they *are* impartial, free . . . from any 'bias or prejudice' . . ."

Here respondent Insurance Commissioner did not merely "deprecate the presumption of innocence"—he swore under oath that he *knew* the facts were contrary to petitioner's claim.

Such prejudgment in any tribunal violates Due Process, and the existence of such prejudgment in an administrative "judge" creates an exception to any otherwise applicable rule of exhaustion of administrative remedies. See *National Lawyers Guild v. Brownell,* decided May 4, 1954 in the U. S. Court of Appeals for the District of Columbia, No. 12059 in that court (not yet officially reported but printed in *New York Guild Lawyer,* Vol. 12, No. 5, May 1954, p. 1 and reprinted in the Appendix). That was an action to enjoin the

holding of an administrative hearing by the Attorney General to determine whether or not plaintiff Guild should be listed as "subversive"; the complaint relied, among other grounds, on the charge that defendant Attorney General had publicly prejudged the case, and evidence to that effect was presented. The Court of Appeals *reversed* the order of the trial court *denying* a preliminary injunction and stated:

> "We are of the opinion that the interests of justice would be served best in this matter if the administrative hearing were held in abeyance pending the judgment of the district court *upon the merits* of the issues posed in the action." (Emphasis added.)

See also *Farmer v. United Electrical Radio & Machine Workers,* 1953, 211 Fed. (2d) 36, 40 (cert. den. in 347 U. S. 943) likewise refusing to enforce the exhaustion doctrine, the court saying:

> "In these circumstances it can hardly be said that the action assailed is not ripe for review or that the Unions should be required to exhaust a dubious opportunity for hearing offered to them after the ax had fallen or that there is an adequate remedy at law for the injuries resulting from the Board's unlawful action."

Due process requires a like rule in the instant case.

THE JUDGMENT OF THE DISTRICT COURT OF APPEAL WAS A "FINAL" JUDGMENT.

The judgment here sought to be reviewed is one reversing an order granting a preliminary injunction.

It is nevertheless a "final" judgment within the purview of 28 USC Section 1257, under the special circumstances of this case.

The "final judgment" rule is not one to be mechanically applied. *Republic Natural Gas Co. v. Oklahoma,* 1948, 334 U. S. 62, at page 68, 92 L. Ed. 1212 at 1220. Under the applicable law the judgment in this case is "final" for two reasons:

(1) The judgment of the District Court of Appeal, unless reversed, will finally and fully determine the action below. The complaint in the action below alleged that respondent Insurance Commissioner was about to conduct an administrative prosecution against petitioners, that the trial of such prosecution was imminent (being scheduled to commence in six days when the complaint was filed (C. T. p. 7, Complaint, par. X)), that such prosecution was intentionally discriminatory and therefore unconstitutional, and would cause petitioners irreparable harm; the relief sought was an injunction, enjoining the hearing of such administrative proceeding. The opinion of the District Court of Appeal held that exhaustion of petitioner's "administrative remedies" was a condition precedent to any judicial relief (that is, that petitioners must submit to and undergo the very administrative proceeding, and the damage resulting therefrom, which it was the purpose of the action to enjoin and prevent) and that damage resulting from such an unconstitutional hearing was damage for which the law granted no relief. On remand of the case to the trial court, in the face of this holding, the trial court can do but one

thing, namely, dismiss the action. At the minimum, it is clear that it must dissolve the temporary injunction, following which the administrative proceeding will take place forthwith. Once this occurs, of course, any attempt to "prevent" the administrative proceeding would be moot. The case therefore falls within the rule of such cases as *Richfield Oil Corp. v. State Board,* 1946, 329 U. S. 69, 91 L. Ed. 69; *Gulf Oil Co. v. U. S.,* 1925, 269 U. S. 125, 136, 70 L. Ed. 195; and *North Carolina Rd. Co. v. Story,* 1925, 268 U. S. 288, 69 L. Ed. 959. In the words of this Court in the *Richfield Oil Corp.* case, the District Court of Appeal "has passed on the issues which control the litigation" and "its decision controls the disposition of the case" (329 U. S. 69, 73, 91 L. Ed. 80, 88). Or, as this Court said in the *North Carolina Rd. Co.* case, "Injunction was the only relief which the company sought or could seek under its petition and prayer . . . [The judgment of the District Court of Appeal] "left nothing for the [trial] court to do but to dismiss the petition." (268 U. S. 288, at p. 291, 69 L. Ed. 959, at 961.)

(2) This case also falls within the rule of cases such as *Clark v. Williard,* 1933, 292 U. S. 112, 78 L. Ed. 1160, and *Gumbel v. Pitkin,* 1884, 113 U. S. 545, 28 L. Ed. 1128, under which an order, which from some aspects might be deemed interlocutory, is held final because decreeing immediate transfer of possession of physical property, or otherwise directly and immediately affecting important rights of the parties. See *Republic Natural Gas Co. v. Oklahoma,* 1948, 334 U. S. 62, at 68, 92 L. Ed. 1212 at 1220,

where this Court said "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing," citing *Clark v. Williard* and *Gumbel v. Pitkin,* supra. Certainly the action below is such a case. Unless review of the judgment of the District Court of Appeal be granted at this time, petitioners will in fact have lost any and all opportunity for review. Under such circumstances, the controversy is indeed at a point where petitioners "would be irreparably injured if review were unavailing."

CONCLUSION.

Petitioners submit this case presents substantial Equal Protection and Due Process issues, and respectfully pray that the writ of certiorari issue.

Dated, San Francisco, California,
January 6, 1955.

JESSE H. STEINHART,
Attorney for Petitioners.

JOHN J. GOLDBERG,
NEIL E. FALCONER,
Of Counsel.

(Appendix Follows.)

Appendix

In the Superior Court
State of California
City and County of San Francisco

No. 425,492

United Insurance Company of Chicago, Illinois, a corporation, Charles Joseph, Sam Joseph and Louis Hirschorn,

Plaintiffs,

vs.

John R. Maloney, individually and as Insurance Commissioner of the State of California,

Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION.

The order to show cause why a preliminary injunction should not be granted herein pending this action and until the further order of this court, which order to show cause is dated February 24, 1953, came on regularly for hearing before the above entitled court in Department 7 thereof, Honorable Albert C. Wollenberg, Judge of the Superior Court, presiding, on

March 4, 1953, at 10:00 o'clock A.M., at which time the parties were present and were represented by their respective counsel and affidavits in support of and counter affidavits in opposition to the application for a preliminary injunction, and other documentary evidence, were offered by the parties and received in evidence and respective memoranda in support of and in opposition to such application were filed. Further hearing of the matter was thereupon continued to March 10, 1953 at 2:00 o'clock P.M. at which time affidavits in reply to the counter affidavits of defendant were offered by plaintiffs and received in evidence, and oral argument in support of the application for preliminary injunction was made by counsel for plaintiffs; and further hearing was thereupon continued to March 31, 1953, at 1:00 o'clock P.M., at which time reply affidavits on behalf of defendant and further reply affidavits on behalf of plaintiffs were offered by the respective parties and received in evidence, and further oral argument was made by counsel for plaintiffs and by counsel for defendant on the said 31st day of March, 1953, whereupon the matter was continued to April 1, 1953, at 1:00 o'clock P.M., for further argument of counsel, at which time further argument was had, and the matter was thereupon submitted to the court for decision on April 1, 1953, subject to the filing of further memoranda of points and authorities by the respective parties; and the respective parties having thereafter filed such further memoranda of points and authorities with the court; and the court having examined the evidence submitted by the parties and

all of the pleadings, records and files in the above entitled action and the respective memoranda of points and authorities filed by the parties, and being fully advised in the premises; and it satisfactorily appearing to the court that this is a proper case for a preliminary injunction and that sufficient grounds existed therefor;

It Is Hereby Ordered that during the pendency of the above entitled action and until the further order of this court defendant and his deputies, assistants, agents, representatives and employees, and each of them, be and they are hereby restrained and enjoined from proceeding any further, or taking any further action, step or proceeding whatever in any one or more of those certain proceedings now pending in the Department of Insurance of the State of California entitled and numbered, respectively, as follows:

1. In the Matter of the Certificate of Authority to Transact Life and Disability Insurance in the State of California of United Insurance Company of Chicago, Illinois, Respondent, No. S.F. 3001-ABC-P;

2. In the Matter of the License to Act as a Life and Disability Agent of Charles Joseph, Respondent, No. S.F. 6604-AP;

3. In the Matter of the License to Act as a Disability Only Agent of Sam Joseph, Respondent, No. S.F. 6758-AP;

4. In the Matter of the License to Act as a Life and Disability Agent of Louis Hirschorn, Respondent, No. S.F. 5049-AP;

It Is Further Ordered that the preliminary injunction hereinabove provided for and set forth shall become effective upon plaintiffs executing and filing herein a written undertaking, with sufficient sureties, in the sum of $1000.00 conditioned as required by law, the same to be filed within 10 days from the date hereof; and that in the meantime and until the filing of such undertaking the restraining order heretofore issued herein shall and does remain in full force and effect.

Done in open court this 21st day of April, 1953.

Albert C. Wollenberg,
Judge of the Superior Court.

(Endorsed.) Filed Apr. 21, 1953.
Martin Mongan, Clerk.
By J. Keegan, Deputy Clerk.

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

---

1 Civil No. 15,946

United Insurance Company of Chicago, Illinois, a corporation, Charles Joseph, Sam Joseph and Louis Hirschorn,
Plaintiffs and Respondents,
vs.
John R. Maloney, individually and as Insurance Commissioner of the State of California,
Defendant and Appellant.

OPINION

Appeal from an order of the superior court granting a preliminary injunction restraining defendant pendente lite from proceeding to hear certain accusations against plaintiffs.

QUESTION PRESENTED.

Does the rule of exhaustion of administrative remedies apply?

RECORD.

Accusations were filed with the California Insurance Commissioner charging United Insurance Company and its California general agents, the individual plaintiffs, with misrepresentations in the sale of its commercial disability (sickness and health) insurance policies, and doing business in bad faith. The particular charges resolve themselves into a claim that in its advertisements, circulars and in the representations by the agents the policies are represented as covering all sickness and health and no mention is made of the exceptions. The accused filed notice of defense. A hearing was set and continued on two occasions at their request. Then the accused, respondents here, brought a proceeding in the superior court to restrain appellant from proceeding with the hearings, on the ground primarily that the same types of representations have been used by similar companies in California for many years and still are; that the contents of the literature had been discussed with the commissioner's office and not objected to; that no similar accusations had been filed against any other insurance company, with one exception; that the commissioner did not intend to file against any other company; that the commissioner knowingly and intentionally was discriminating against respondents, thereby depriving them of due process and equal protection of the law. Allegations of irreparable damage already accrued and to accrue if the hearing is had, are made. The trial court upon the records and affidavits granted a preliminary injunction. This appeal is from the order granting such injunction.

CONTENTIONS.

It is conceded that an intentional and knowing discrimination in the enforcement of an otherwise valid law, if it existed, would be a violation of the equal protection clause of 14th amendment of the United States Constitution. (See Yick Wo v. Hopkins, (1886) 118 U. S. 356, 30 L. Ed. 220, 227.)

Defendant contends that before plaintiffs may resort to the courts for injunctive relief to prevent the commissioner from hearing said accusations, plaintiffs must exhaust their administrative remedies, one of which is to present at the hearing their defense based on the claimed discrimination. Plaintiffs are doubtful if such defense may be presented before the commissioner, but, in any event, contend that there is an exception to the general rule requiring the exhaustion of administrative remedies where irreparable damage is threatened by invalid and illegal administrative action.

ADMINISTRATIVE REMEDY RULE.

We entertain no doubt that the claim of intentional discriminatory application of the law is a defense which properly may be presented to an administrative officer in an accusatory proceeding. See Security-First Nat. Bk. v. County of L. A., 35 Cal. 2d 319, and cases there cited holding that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error, even though he claims that the tax is discriminatory in

violation of constitutional mandates. Section 11506, Government Code, dealing with procedure in such matters, states that in the notice of defense to the accusation the person accused may "Present new matter by way of defense." A charge of unconstitutional action goes to the very jurisdiction of the administrative officer or body to entertain the proceeding and hence is a matter which he or it must consider and decide at the outset of the proceeding. (See Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 303.)

The general rule requiring exhaustion of administrative remedies before equitable relief can be granted is well established. There are innumerable federal and state authorities upholding the rule. As said in Abelleira v. District Court of Appeal, supra, 17 Cal. 2d 280, 292, "The California cases have consistently applied this settled rule." See that case for a long list of cases on the subject. Among the many California cases following the rule are United States v. Superior Court, 19 Cal. 2d 189; Brock v. Superior Court, 109 Cal. App. 2d 594; Security-First Nat. Bank v. County of L. A., supra, 35 Cal. 2d 319; Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App. 2d 218; Blake v. Public Utilities Commission, 120 Cal. App. 2d 671.

The exception to the rule which exception plaintiffs would apply in this case is the one referred to, but not applied, in Abelleira v. District Court of Appeal, supra, 17 Cal. 2d 280, and United States v. Superior Court, supra, 19 Cal. 2d 189. That exception is to the

effect that injunctive relief may be granted against invalid administrative action if irreparable damage will occur if the person affected were required to exhaust his administrative remedies. An example of the application of the exception is given in Abelleira v. District Court of Appeal, supra, 17 Cal. 2d 280, at page 296, where the court points out that where an administrative body imposes a confiscatory rate on a public utility, the continued operation of the business at the rate imposed pending an appeal might in some instances be so unprofitable as to amount to a destruction of the business and therefore taking property without due process of law. The courts in such cases issue injunctions to stay the enforcement of the new rate until a final determination of its validity, in order to protect the constitutional rights of the petitioning utilities. However, in all the cases cited by counsel or which we have been able to find on the subject, there are none in which the type of action taken by the administrative body was merely setting an accusation or other matter for hearing, nor was the type of injury which may result to a person from the fact of a hearing one which was considered as the irreparable injury necessary for the application of the exception. Thus, the cases seem to require for its application some action by the administrative body more than setting a matter for hearing, and some injury more than that caused by the fact of hearing, and the only cases discussing the attempted application of the exception to hearings flatly hold that the latter do not come within the exception. In Myers v.

Bethlehem Corp., 303 U. S. 41, cited in the Abelleira case, supra, page 292, a complaint had been filed by the National Labor Relations Board against an employer charged to be engaged in unfair practices prohibited by the National Labor Relations Act. In reversing the decree of the District Court, which had been affirmed by the Circuit Court of Appeals for the First Circuit, the Supreme Court referred to the fact that the employer contended that it was not engaged in the type of commerce that would bring it within the act and that as is claimed by plaintiffs here, a hearing on the charges would subject it to irreparable damage violating rights guaranteed by the federal Constitution. The court then said (pp. 50-52): "The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

In a footnote, pages 51-52, the court cites the following cases holding that the sort of injury or damage done to an employer's business by the holding of hearings by the National Labor Relations Board is not the type of irreparable injury permitting equitable interference with the administrative process; Clark v. Lindemann & Hoverson Co., 88 F. 2d 59; Bradley Lumber Co. v. National Labor Relations Board, 84 F. 2d 97; Heller Bros. Co. v. Lind, 86 F. 2d 862; Richmond Hosiery Mills v. Camp, 74 F. 2d 200.

In Fed. Power Comm'n v. Edison Co., 304 U. S. 375, the court said (p. 385): "So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration."

In Chamber of Commerce v. Federal Trade Commission, 280 F. 45, an action in the Circuit Court of Appeals for an order requiring the Federal Trade Commission to certify to that court for review and determination an order of investigation, the court said (pp. 48-49): "The real gist of the complaint here is that it is claimed, and with plausibility, that the chief petitioner is not subject to the jurisdiction of the Federal Trade Commission; that the commission is proceeding erroneously and in excess of its powers; that the taking of the testimony before a final order can be made will be very expensive; and that a grievous burden is being inflicted upon petitioners, for

which an ultimate setting aside of any order that may be made will not adequately compensate them. This is true in some degree of any order of the commission which may finally be set aside. The law does not contemplate that commissions of this nature will act arbitrarily nor without probable cause. It is, of course, conceivable that they may do so; but such a possibility cannot justify this court in exceeding its statutory powers and authority. To do so would be to deny to the administrative and legislative branches of the government the powers and authority which have been conferred upon them, and which have been uniformly upheld by the courts."

That the commissioner's order fixing the accusations for hearing is not the type of order or action contemplated in the exception is shown by the following statement from Fed. Power Comm'n v. Edison Co., supra, 304 U. S. 375, 385: "The Commission's order of January 26, 1937, (a) fixed a date for hearing, (b) required respondents to appear, and (c) required them to produce the information and documents described. In fixing a date for hearing, the order was nothing more than a notice. United States v. Illinois Central R. Co., supra [244 U. S. 82] 89."

To the same effect is South Porto Rico Sugar Company v. Munoz, 28 F. 2d 820. In this case the court said (p. 821): "If we assume for the moment that this Public Service Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would

not follow that, on appearance and argument, the commission would adhere to an erroneous view as to the nature and extent of its jurisdiction."

That the publicity attendant upon an administrative hearing does not constitute such damage as to entitle one to interference by the courts is shown in Mortgage Finance Corp. v. Watson, 104 Cal. App. 2d 640, where the court pointed out that, as here, "publicity has already been given to the charges and to the fact that a hearing is being held . . ." (P. 641.)

Plaintiffs fail to point out how their claimed damage from the fact of a hearing is different in kind from those which in the cases hereinbefore cited have been held not to constitute irreparable damage. They attempt to do so by claiming that the action of the commissioner is unconstitutional and discriminatory and that such action itself constitutes irreparable damage. But as shown by the cases herein discussed, it never has been held that the mere holding of a hearing comes within the rule of irreparable damage (see quotation, pages 5-6, from Myers v. Bethlehem Corp., 303 U. S. 41).

"And even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief. (Citing cases.) If, under the rule applied in these cases, an attack upon the constitutionality of the statute does not remove the necessity for following the prescribed administrative remedy, then clearly injunctive aid may not be had where,

as here, the validity of a single regulation promulgated under such a statute is challenged." (United States v. Superior Court, supra, 19 Cal. 2d 189, 195.) See Allen v. Grand Central Aircraft Co., 74 S. Ct. 745, where it is said: ". . . it is clear that once the right of the Government to hold administrative hearings is established, a litigant cannot enjoin them merely because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing . . . '[T]he expense and annoyance of litigation is "part of the social burden of living under government." ' " (P. 748.)

Plaintiffs contend whether or not the exception above mentioned applies, they are entitled to relief on the theory that the courts will enjoin an intentional and knowing discrimination by a public official in the enforcement of a valid law. For this contention, they rely on such cases as Yick Wo v. Hopkins, supra, 118 U. S. 356; Wade v. City & County of San Francisco, 82 Cal. App. 2d 337; Brock v. Superior Court, 12 Cal. 2d 605; French Art Cleaners v. St. Bd. etc. Cleaners, 91 Cal. App. 2d 890; Downing v. Cal. State Board of Pharmacy, 85 Cal. App. 2d 30; Davis v. Cook, 80 Fed. Supp. 443; Carter v. School Board of Arlington County, Va., 182 F. 2d 531.

It should be noted that in only two of these cases was the rule of exhaustion of administrative remedies raised or discussed, while in the following cases where the alleged discrimination of the public officer or body was the, or one of the, grounds, upon which injunctive relief was sought, such relief was denied: Security-First Nat. Bk. v. County of L. A., supra, 35 Cal. 2d

319, 321; Luce v. City of San Diego, 198 Cal. 405; Dawson v. County of Los Angeles, 15 Cal. 2d 77; De Mille v. County of Los Angeles, 25 Cal. App. 2d 506. The two cases above mentioned in which it was held that administrative remedies need not be exhausted were Davis v. Cook, supra, 80 Fed. Supp. 443, involving the discriminatory practice of unequal pay schedules between white and negro teachers, and Carter v. School Board of Arlington County, Va., supra, 182 F. 2d 531, involving discrimination in school facilities between negro and white students. No discussion of the reason for not applying the exhaustion rule in these cases is given, and they seem to be the only exception of this type to the rule. Apparently the well known attitude of school authorities in Georgia and Virginia made such an exception necessary. The exception has not been applied to hearings by administrative bodies even though it is charged that, as here, application to such bodies would be futile. That contention was made in First Natl. Bank v. Weld County, 264 U. S. 450. There it was contended that the taxes levied against the plaintiff were excessive, discriminatory and illegal. In answering the contention of futility, the court said (p. 454): ". . . we cannot assume that if application had been made to the Commission proper relief would not have been accorded by that body . . ." In Abelleira v. District Court of Appeal, supra, 17 Cal. 2d 280, it was contended that it would be futile for the petitioners to appeal to the California Employment Commission from the ruling of its referee on claims for unemployment benefits (the

administrative remedy provided by the California Unemployment Insurance Act) for the reason that "the commission had already decided cases on similar facts against their present position . . ." (P. 300.) Concerning this contention the court said (p. 301): ". . . their position is unsound in principle and unsupported by the better authorities, for it was early perceived that to countenance this view would break down the rule of exhaustion of remedies. . . . The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide. This argument, though successful in a few cases, has been rejected by the weight of authority. In Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 209 [49 Sup. Ct. 282, 73 L. Ed. 652], the court said that orderly action could not be defeated 'by alleging an intent to deny the relief sought.' And in Red River Broadcasting Co. v. Federal Communications Com., supra [98 F. 2d 282], the opinion states: 'Appellant seeks further to excuse its failure, affirmatively to seek administrative relief, by contending that, even if it had attempted to do so, its request would have been denied; consequently, that its attempt would have been a futile and useless gesture. We cannot assume that consequence. If under such circumstances relief had been sought and denied, then there would have been basis for appeal . . . It cannot be heard to complain in this court that there was danger of refusal when it made no effort to do so.'

(See, also, United States Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, 488 [52 Sup. Ct. 247, 76 L. Ed. 408]; United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 272 [51 Sup. Ct. 376, 75 L. Ed. 1025].)" As also said in the Abelleira case (p. 286): "The question here is whether boards and commissions, charged with the administration of a statute, may carry on their administrative proceedings to completion before being subjected to judicial review. The importance of that issue can hardly be overestimated, since a curtailment of administrative jurisdiction usually means an enlargement of the duties of the courts in a field in which the courts traditionally are reluctant to enter."

With the possible exception of the segregation cases above mentioned, the exhaustion rule has been applied to cases where it was charged that the action of the administrative body was discriminatory. Thus in Stanley v. Supervisors of Albany, 121 U. S. 535, where it was held that the plaintiffs should have followed their administrative remedy, one of the claimed grounds for intervention by the court was that defendant discriminated in the assessment of taxes in favor of state bank stocks as against national bank stocks. A similar situation existed in First Natl. Bank v. Weld County, supra, 264 U. S. 450; Security-First Nat. Bk. v. County of L. A., supra, 35 Cal. 2d 319.

Cases cited by plaintiffs in which the discriminatory enforcement of a penal law or ordinance has been enjoined are not in point for the reason that they were not dealing with a proposed hearing by an admin-

istrative board or officer but with an arrest or threatened arrest caused by such board or officer. Thus, in Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, and in Yick Wo v. Hopkins, supra, 118 U. S. 356, the petitioners were threatened with arrest for alleged violation of certain ordinances. Brock v. Superior Court, supra, 12 Cal. 2d 605, dealt with the attempted enforcement by the Director of Agriculture and others of a plan already adopted under what was claimed to be an unconstitutional law. In French Art Cleaners v. St. Bd. etc. Cleaners, supra, 91 Cal. App. 2d 890, the board had already made and was seeking to enforce certain price orders.

In none of these cases was there any discussion of the exhaustion rule as there were no administrative remedies to be applied.

In Downing v. Cal. State Board of Pharmacy, supra, 85 Cal. App. 2d 30, we said (p. 36): "If law enforcement officers attempt to enforce a criminal statute arbitrarily and in a discriminatory manner, such action may be restrained by the courts." But that is a long way from holding that because of charges that an administrative officer is acting arbitrarily and in a discriminating manner in holding an investigatory hearing, the courts may interfere.

Cases cited by plaintiffs such as Brock v. Superior Court, 11 Cal. 2d 682, Agricultural Prorate Com. v. Superior Court, 5 Cal. 2d 550, Agricultural P. Com. v. Superior Court, 31 Cal. App. 2d 518, State Comp. Ins. Fund v. Maloney, 121 Cal. App. 2d 33, Columbia

System v. United States, 316 U. S. 407, are not in point. In every one the administrative board or officer had already acted by issuing an order which it was claimed was invalid or discriminatory and the carrying out of which would cause irreparable injury if the order should turn out to have been illegal or improper.

Because the order fixing hearing and the hearing proposed here are not the types of action to bring plaintiffs within the exception to the exhaustion rule mentioned in Abelleira v. District Court of Appeal, supra, 17 Cal. 2d 280, and United States v. Superior Court, supra, 19 Cal. 2d 189, nor is the type of damage to be suffered by plaintiffs from the holding of the proposed hearing the type of damage considered irreparable within the exception rule, and because of plaintiffs' failure to exercise their administrative remedy, the trial court had no discretion in the matter and should have refused to issue a preliminary injunction.

The order is reversed.

Bray, J.

We concur:
Peters, P. J.
Fred B. Wood, J.

Filed August 18, 1954,
Walter S. Chisholm, Clerk,
By Paul Dinoia, Deputy.

United States Court of Appeals
District of Columbia Circuit

No. 12,059

National Lawyers Guild,
Appellant,
vs.
Herbert Brownell, Jr., Attorney General of the United States,
Appellee.

Appeal from the United States District Court for the District of Columbia

Before Wilbur K. Miller and Prettyman, Circuit Judges and Matthew F. McGuire, District Judge (sitting by designation).

Decided May 4, 1954.

PER CURIAM: This is an appeal from a denial by the United States District Court for the District of Columbia of a preliminary injunction. The motion for the injunction was considered by that court upon the pleadings filed by the complainant (our appellant), consisting of the complaint, the exhibits attached thereto, and affidavits in support of the motion. Upon consideration of the arguments on the appeal to this court, presented in the briefs and upon oral argument, and of the facts contained in the

complaint, the exhibits, and the affidavits which were before the District Court (which facts have not yet been controverted in the record before us), we are of the opinion that the interests of justice would be served best in this matter if the administrative hearing were held in abeyance pending the judgment of the District Court upon the merits of the issues posed in the action. An order to that effect will be entered. The motion was for a preliminary injunction of the usual scope, effective until the ultimate disposition of the case, including appeals. But we think such an extensive stay is not justified at the present stage of the proceedings. We suggest to the District Court that, if the calendar of its business permits, the public interest would be served if this action could be heard and determined at an early date.

(Judge McGuire dissenting.)

JAN 21 1955
HAROLD B. WILLEY, Cle

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 523

UNITED INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, CHARLES JOSEPH, SAM JOSEPH and LOUIS HIRSCHORN,

Petitioners,

vs.

JOHN R. MALONEY, individually and as Insurance Commissioner of the State of California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal of the State of California, First Appellate District, Division One.

EDMUND G. BROWN,
Attorney General of the State of California,
HAROLD B. HAAS,
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600 State Building, San Francisco 2, California,
Attorneys for Respondent.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1954

No. 523

UNITED INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, CHARLES JOSEPH, SAM JOSEPH and LOUIS HIRSCHORN,

Petitioners,

vs.

JOHN R. MALONEY, individually and as Insurance Commissioner of the State of California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, First Appellate District, Division One.

QUESTIONS PRESENTED.

The first question presented by the petitioner assumes intentional and deliberate discrimination by the petitioner. (Pet. for Writ of Cert., p. 3.) As will be pointed out below in our Statement of the Case, the assumption is without warrant, such discrimination being claimed by petitioner and evidence—by affidavits—thereon being introduced by both parties. The opinion sought to be reviewed properly treats the question of discrimination as undecided. Consequently the initial "Where" in the first question should read "Where petitioner asserts."

The second question presented also makes an incorrect statement of fact, a statement that the Insurance Commissioner had "before the hearing commenced, stated under oath that he knows the charge of discrimination is unfounded." (Pet. for Writ of Cert., p. 4.) In our argument below we shall point out that no such statement was made by the Commissioner. Consequently the parenthesized matter should be deleted from the second question.

STATEMENT OF THE CASE.

The petitioner states the case as though all the assertions made in its supporting affidavits before the trial Court had been proved or conceded by the Commissioner. On the contrary there were a number of affidavits in opposition. (Exhibits B-K.)

These affidavits in opposition, we believe, stated facts which would have destroyed the claim of intentional discrimination made by petitioner.

Petitioner apparently founds its statement in this fashion upon the theory that the Commissioner conceded the fact on appeal (Pet. for Writ of Cert., pp. 9-10) and that the grant of the preliminary injunction (pendente lite) had the effect of implied findings (Pet. for Writ of Cert., p. 10) (in California practice no findings of fact are made on an order granting preliminary injunction).

The quotations from the Commissioner's Opening Brief before the California District Court of Appeal and in his Answer to the Petition for Rehearing before that Court, set forth on pages 9 and 10 of the Petition for Writ of Certiorari herein, do not establish any of the "concessions" (Pet. for Writ of Cert., p. 10) claimed by Petitioner, nor were any such concessions made. The basis of the appeal was the narrow ground that the trial Court did not have jurisdiction to entertain petitioners' action because petitioner had failed to exhaust administrative remedies. Consequently the quoted portion of the Commissioner's Opening Brief pointed out that the merits of petitioner's cause of action, if any, were not in issue on the appeal. The quotation from the Commissioner's Answer to the Petition for Rehearing is an excellent example of distortion by lifting a sentence from context. The quoted sentence was followed by the following which petitioner fails to quote:

> "Defendant and appellant's contention was that the alleged losses, if they existed, did not constitute the kind of damage which justified equitable intervention, and the opinion adopted appellant's contention on the basis of a series

of cases which are directly in point." (Answer to Pet. for Rehear., p. 2, lines 13-17.)

Likewise, the inference of "implied findings" of fact by the trial Court (Pet. for Writ of Cert. p. 10) was advanced by petitioner in its petition for rehearing by the District Court of Appeal (Pet. for Rehear. pp. 5-6, 9) and was there answered by the Commissioner as follows:

> "The second point raised by the petition for a rehearing relies upon allegation and proof by respondents that the calling of a hearing against them was discriminatory and a legal wrong.
>
> "But this is to confuse the law regarding preliminary injunctions:
>
> 'The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the rights claimed by him.' (14 Cal. Jur. 184; *Bomberger v. McKelvey,* 35 Cal. 2d 607, 612, 220 Pac. 2d 729; *State Compensation Ins. Fund v. Maloney,* 121 A.C.A. 49, 59, 262 Pac. 2d 662.)
>
> "To assert that the plaintiff 'proved' that the accusatory hearing was discriminatory and a legal wrong, is to entirely mistake the effect of the preliminary injunction. It is to assume the answer on the merits. The effect of the preliminary injunction was merely a determination of the court that *in its opinion* sufficient of a show-

ing had been made by plaintiff to entitle it *to exercise its discretion* to suspend the administrative proceeding by injunction pending a trial on the merits. The opinion here under attack merely holds that he did not have that discretion in the absence of an administrative order, the operation of which would irreparably injure the respondent pending trial on the merits." (Answer to Pet. for Rehear. p. 3, line 16 to p. 4, line 19.)

A glance at the opinion sought to be reviewed also shows that the District Court of Appeal had taken this view of the matter. In summarizing the record it carefully avoided any statement that either the charges in the accusation filed before the Commissioner or the allegations made in the complaint before the trial Court were true or untrue. (Pet. for Writ of Cert. p. vi.) Toward the close of the opinion, the Court refers to principle that equity will enjoin arbitrary and discriminatory enforcement of a criminal statute by criminal proceedings and comments "But that is a long way from holding that *because of charges* that an administrative officer is acting arbitrarily and in a discriminating manner in holding an investigatory hearing, the Courts may interfere". (Pet. for Writ of Cert. p. xviii; emphasis supplied.)

ARGUMENT.

The two federal questions asserted by petitioner at the beginning of its "Argument" (Pet. for Writ

of Cert. pp. 12-13) are likewise vitiated by the same factors as vitiate substantially the same subject matter under its caption "Questions Presented for Review", and emphasized in petitioner's second purported federal question on argument, the assumption that the Insurance Commissioner has stated on oath that there is no merit to the charge of discrimination. The affidavits—the only oath-bound statements of the Insurance Commissioner—are very expressly limited to facts of which he has personal knowledge (Exhibits B and G). Under our California law the department staff and Commissioner himself would be subject to subpoena, on behalf of the accused, to examine them at the hearing on the actual existence of these facts, before a hearing officer from outside the Insurance Department. (Cal. Gov. Code 11512.) The evidence so adduced would be subject to subsequent judicial re-evaluation *both as to preponderance and sufficiency.* (Cal. Code Civ. Proc. sec. 1094.5; *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 196 Pac. 2d 20.) The Commissioner's statements thus made are that the issuance of the accusation had been pursuant to a department policy by authority vested in staff members (Ex. B, page 4, lines 7-12), and that he has not instructed anyone not to proceed against other companies. He does not express himself on the merits of the petitioner's claim of discrimination. If petitioner's claim of discrimination is bottomed upon an asserted intention of the Commissioner not to bring accusations against other companies and upon an alleged issuance of the accusation without authority, these statements would be relevant,

of course, but not conclusive on the merits. If the claim is based in fact upon an actual failure of the Commissioner to act against other companies, the actual record of departmental action would be the only really relevant question; as indeed such a record might well be so conclusive as to make the *intention* of the Commissioner academic! In any event certainly the affidavits of the Commissioner are in no sense a statement, under oath or otherwise, as to the merit or demerit of the charges of discrimination.

Generally, the Insurance Commissioner properly rests his contention, that no federal question is presented, upon the cases in United States Courts, including this Court, cited in the opinion of the California District Court of Appeal.

However, there is a separate and independent defense as to any federal question. Here, in the event of punitive action by the Insurance Commissioner after administrative hearing, section 1094.5 of the California Code of Civil Procedure affords a complete review by judicial means of the whole matter. (*Moran v. Board of Medical Examiners, supra; Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 184 Pac. 2d 323.) And the administrative proceeding itself must be conducted pursuant to statutory procedural provisions, substantial compliance with which is jurisdictional. (*National Auto. & Cas. Ins. Co. v. Downey,* 98 Cal. App. 2d 586, 220 Pac. 2d 962.)

Consequently this matter reduces itself to the simple question of whether petitioner has a right to preliminary injunction guaranteed by the United States Con-

stitution, or whether it must seek a different remedy prescribed by the State law, which gives it opportunity to be heard and a judicial review.

To this, we submit, there can be but one answer: The loss or damage involved certainly is not as great as would be involved were this a seizure of the petitioner's business without a prior hearing (*State Savings, etc. Bank v. Anderson,* 238 U.S. 611; *Title Guaranty & S. Co. v. Allen,* 240 U.S. 136; *Neblett v. Carpenter,* 305 U.S. 297), and there is no such constitutional right in a particular form of remedy (*Gibbes v. Zimmerman,* 290 U.S. 326; *Insurance Co. v. Glidden Co.,* 284 U.S. 151; *Crane v. Hahlo,* 258 U.S. 142).

Consequently, apart from the concurrence of Federal and California law on the principle of exhaustion of administrative remedies, no federal question is presented by the application of that principle by the California Courts in this particular case.

Dated, San Francisco, California,
January 17, 1955.

Respectfully submitted,

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Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 523

UNITED INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, CHARLES JOSEPH, SAM JOSEPH and LOUIS HIRSCHORN,

Petitioners,

vs.

JOHN R. MALONEY, individually and as Insurance Commissioner of the State of California,

Respondent.

REPLY BRIEF OF PETITIONERS.

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Respondent.

REPLY BRIEF OF PETITIONERS.

In his brief filed in opposition to petitioners' Petition for a Writ of Certiorari, respondent advances essentially two contentions of fact and one of law:

(1) That respondent has never conceded that petitioners in the trial court *proved* that he was

guilty of intentional discrimination, nor did any court so find;

(2) That, contrary to petitioners' claim, respondent did *not* in fact deny under oath the merit of petitioners' claim of intentional discrimination by him, and therefore to compel petitioners to submit the issue of intentional discrimination to respondent for hearing and determination by him will not deny petitioners due process of law;

(3) That petitioners are claiming a constitutional right to a particular remedy, whereas another adequate remedy is available.

Each contention is unsound.

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1. THERE IS NO ISSUE AS TO THE SUFFICIENCY OF THE EVIDENCE.

Respondent's statement that he has never expressly conceded that he was guilty of intentional discrimination, and that the trial court made no express finding to that effect, is correct. The fact remains, however, that petitioners presented evidence of intentional discrimination, and that the trial court held (implicitly but necessarily) that such evidence sufficiently met the requirements of California law. It is true, as counsel states (brief in opposition to petition for certiorari, p. 4) that, on an application for a preliminary injunction, California law does not require conclusive proof by the party seeking the relief or even that degree of proof required to prevail upon

a trial on the merits. That rule, however, is adopted to make injunctive relief more available, not less, to parties seeking it.

It is a clear perversion of such a rule of law, intentionally solicitous of the rights of plaintiffs seeking relief, to turn it around (as respondent seeks to do) and say, After all, the trial court never *found* intentional discrimination, therefore you did not prove it, and therefore your claim is without merit. The trial court in granting the preliminary injunction, *did* find that all the showing of intentional discrimination required by California law for issuance of a temporary injunction had been made. At no time since has respondent challenged that finding as not justified by the evidence. Instead he has chosen to rely purely on the narrow contention that the trial court lacked any authority to grant relief, regardless of the factual showing; a contention which, if valid, applies to any case no matter how conclusively intentional discrimination is shown.

It seems paradoxical for respondent to admit that the law of California grants relief in the trial court on a sufficient showing of intentional discrimination and resultant damage without final "proof" thereof, and then to argue in this Court that petitioners, who have met every such test, have no standing for any relief because they did not "prove" their case in the trial court.

No matter how respondent attempts to obscure it, his legal position reduces to the proposition that proof

of great and irreparable damage by an intentionally discriminatory, and therefore unconstitutional, administrative proceeding does not authorize judicial relief until the administrative proceeding has been finally completed and the damage done. That is the question presented in our petition for certiorari, and that is the question posed by this case.

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2. RESPONDENT DID DENY UNDER OATH THE CHARGES AGAINST HIM. IT THEREFORE WOULD DENY DUE PROCESS FOR HIM TO PASS UPON SUCH CHARGES.

Respondent seems to claim that his affidavit (Aff. of Maloney, Exhibit B) did not in fact deny "the merits of the petitioners' claim of discrimination" (Respondent's brief in opposition to petition for Certiorari, p. 6), nor express himself "under oath or otherwise, as to the merit or demerit of the charges of discrimination" (Respondent's brief in opposition to certiorari, p. 7) and therefore presumably has an open mind to pass upon such charges in an administrative hearing.

This contention is completely erroneous.

The essence of petitioners' case is that respondent was guilty of *intentional* discrimination against them in commencing and prosecuting the administrative proceedings complained of. Intentional discrimination, if it exists, violates their constitutional rights. Random or chance discrimination, on the other hand, does not violate the Equal Protection clause and

would not violate their constitutional rights. *Sunday Lake Iron Co. v. Wakefield,* 1918, 247 U.S. 350, 353; *Snowden v. Hughes,* 1944, 321 U.S. 1, 7. Proof of intention to discriminate was therefore an essential part of petitioners' case, and they presented such proof to the trial court.

Respondent has denied any such intention flatly and unequivocally under oath. See Affidavit of Maloney, Ex. B, p. 4, lines 13-24:

> "*I had no intention whatsoever* at the time of the issuance of the Accusation against United Insurance Company not to institute similar proceedings against other insurers which may be in violation of the law, *I have had no such intention at any time since and I have no such intention at this time.* I have not at any time instructed any member or members of my staff not to institute disciplinary proceedings against other insurers, I know of no such instruction by any one else in authority in the Department and I categorically deny that any such instructions exist or have ever existed, or that there is any understanding of any kind among the staff of the Department to such effect." (Emphasis added.)

If this does not constitute "prejudgment", it is hard to imagine what does. After this, to be required to submit to respondent, sitting as a "judge", the issue whether he had the intention to discriminate, would make a farce of the "fair trial" guarantee of the Due Process clause.

3. PETITIONERS ARE ENTITLED TO AN EFFECTIVE REMEDY.

Respondent also contends that petitioners in essence are claiming a constitutional right to a particular remedy, that they have no such right, and that an "adequate remedy" is offered them by judicial review at the close of the administrative proceeding. Petitioners concede that no constitutional right to a particular remedy exists, but the very cases cited by respondent hold that the Constitution does guarantee the preservation of their substantial rights to redress by "some *effective* procedure." See *Gibbs v. Zimmerman,* 1933, 290 U.S. 326 at 332; *Hardware D. Mut. F. Ins. Co. v. Glidden Co.,* 1933, 284 U.S. 151 at 159. The right petitioners seek to vindicate is the right not to be damaged by the initiation and prosecution of an intentionally discriminatory administrative proceeding; the damage is done by the hearing, and the right can be protected only by enjoining the hearing. Judicial review *after* the damage has been done is no relief at all.

It would have been more candid for respondent to take the position he took before the District Court of Appeals, which was—not that petitioners had an alternative remedy which was equally "adequate"—but rather that no remedy at all exists to protect anyone from damage, however grievous, caused or threatened from the initiation and prosecution of an intentionally discriminatory administrative proceeding.

4. CONCLUSION.

The foregoing shows:

(1) that there is no issue as to the sufficiency of the proof of unconstitutional discrimination;

(2) that the evidence conclusively demonstrates that respondent has prejudged the case he seeks to try;

(3) that petitioners are entitled to the relief they seek, unless this Court is to hold that no effective remedy exists to prevent irreparable damage caused by unconstitutional discrimination in the initiation and prosecution of an administrative proceeding.

The petition for certiorari should be granted.

Dated, San Francisco, California,
January 31, 1955.

Respectfully submitted,
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